Supreme Court, U.S.
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No. 98-1475

In The

Supreme Court of the United States

October Term, 1998

ROBERT LEE MASSIE,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
LISTING OF PARTIES TO THE PROCEEDING

The caption to this case contains the names of all parties.

RULE 29.6 STATEMENT

No corporations are parties to this case.

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INTRODUCTION

According to the Attorney General, even if the California Supreme Court erred by deciding that jeopardy does not attach where a guilty plea is held invalid under state law on appellate review, the error is unimportant. The Attorney General claims Massie had no constitutional right to represent himself during his 1985 appeal, so the attorney forced on him by the state was "his" attorney. Since "his" attorney obtained the reversal of his conviction which led to his retrial, the argument goes, Massie had no double jeopardy defense to that retrial. Indeed, the Attorney General claims there is no constitutional impediment to California retrying Massie or any other capital defendant as many times as it wishes, whether or not the defendant wants to waive his appeal and assert his double jeopardy right to avoid a theoretically endless cycle of retrials.

On April 19, 1999 this Court granted certiorari in *Martinez v. Court of Appeal of California*, No. 98-7809, to decide the very issue upon which the Attorney General's argument depends: whether a criminal defendant has the constitutional right to represent himself on appeal. If there is such a right and Massie's "attorney" was unconstitutionally forced upon him in the 1985 appeal, then that attorney's conduct cannot be binding upon Massie. If the first appeal cannot reasonably be imputed to Massie, then the Attorney General's principal argument for why Massie's retrial was not barred by the Double Jeopardy Clause collapses.

Particularly in view of this Court's decision to grant certiorari in *Martinez*, this Court should grant this Petition as well in order to fully explain the degree of control which the Constitution requires that a criminal defendant be given over his appeal.[1]

ARGUMENT

A. THE CALIFORNIA SUPREME COURT'S DECISION IS IN CLEAR CONFLICT WITH NUMEROUS DOUBLE JEOPARDY DECISIONS OF THIS COURT, THE CIRCUITS, AND THE STATE COURTS OF LAST RESORT

The California Supreme Court held herein that jeopardy did not attach to Massie's 1979 felony murder conviction because the judgment was reversed in 1985 on the grounds that Massie's guilty plea was invalid under state law. The Petition demonstrates that the California Supreme Court's holding is in conflict with decisions of this Court, the Circuits, and the state courts of last resort in two ways: (1) the California Supreme Court applied state, not federal law, to determine when jeopardy attached; and (2) the attachment of jeopardy is not dependent upon the validity of the judgment, but rather the

[1] Since Massie would be required to overcome procedural barriers in order to argue that this Court's eventual decision in *Martinez* is applicable to his case on collateral review, *see* 28 U.S.C. § 2254(d), *Teague v. Lane*, 489 U.S. 288, 300-01 (1989), *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989), this Court should grant Massie's petition now, on direct review, in order to fully illuminate the important questions raised in *Martinez* and herein.

existence of risk, which is present when a guilty plea is unconditionally accepted by a court with subject matter and personal jurisdiction.

The Attorney General claims there is no conflict of authority because the cases establishing these principles did not involve guilty pleas which were invalid under state law. (Opp. at 10.)

But the Attorney General offers no reason why this distinction would change the analysis in any of the cases relied upon by Massie. This Court has plainly held that the attachment of jeopardy is not dependent upon the ultimate fate on appellate review of a court's judgment. "Jeopardy denotes risk," this Court wrote in *Breed v. Jones*, 421 U.S. 519, 528 (1975). "The Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly." *Price v. Georgia*, 398 U.S. 323, 331 (1970).

The California Supreme Court held that the superior court's error in exercising its jurisdiction prevented jeopardy from attaching to Massie's 1979 conviction and death sentence despite the superior court's unchallenged jurisdiction over the subject matter and Massie's person. This holding is in direct conflict with *Ball v. United States*, 163 U.S. 662, 669-70 (1896), *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), *Benton v. Maryland*, 395 U.S. 784, 796-97 (1969), *Boyd v. Meachum*, 77 F.3d 60, 65 (2nd Cir. 1996), *Block v. State*, 407 A.2d 320, 322, 324 (Md. 1979), and the other cases cited in Massie's Petition. (Pet. at 12-22.)

B. THE ISSUES RAISED BY MASSIE'S PETITION ARE OF SUBSTANTIAL IMPORTANCE

Next, the Attorney General asserts that the issues presented by this Petition are not of substantial importance, and that the case "turns on its own special facts and circumstances." (Opp. at 11.) The Attorney General is wrong.

Like California, the courts of Florida, Alabama, Utah, and Arizona have held that the automatic appeal provided in capital cases by their state statutes cannot be waived by the defendant. *Klokoc v. State*, 589 So.2d 219, 222 (Fla. 1991); *Goode v. State*, 365 So.2d 381, 384 (Fla. 1978); *Evans v. State*, 361 So.2d 666, 667 (Ala. 1978); *State v. Holland*, 777 P.2d 1019, 1021-22 (Utah 1989); *State v. Brewer*, 826 P.2d 783, 789-91 (Ariz. 1992). Thus dozens, perhaps hundreds of cases could be affected by the Attorney General's assertion that there is no constitutional impediment to a non-waivable automatic appeal state trying a capital defendant for murder as many times as it wishes, even where the defendant has unequivocally asserted his double jeopardy rights and repudiated the automatic appeal.

Second, as the Petition notes, eighty to ninety percent of all criminal cases end in a guilty plea. (Pet. at 2.) If any of those defendants are subject to a second trial simply based upon appellate courts finding that their pleas were invalid under state law, the California Supreme Court's holding could affect, once again, dozens, if not hundreds of cases.

Third, following this Court's lead in *United States v. Smith*, 331 U.S. 469, 474-75 (1947), federal law and state

courts of last resort have long recognized that motions for new trials in criminal cases brought by the prosecution or granted *sua sponte* raise serious double jeopardy concerns. If the California Supreme Court's holding is correct, such motions raise no double jeopardy concerns at all if they are based upon arguments that the court's judgment is somehow void under state law. Thus, the California Supreme Court's holding could potentially affect thousands, if not tens of thousands of cases.

But most importantly, there is something deeply troubling about the Attorney General's offhanded dismissal of the significance of the California Supreme Court's erroneous holding. If the attachment of jeopardy is dependent upon what any state legislature chooses to label a "void" judgment, then the Double Jeopardy Clause means something different in each state. Had the events herein taken place in another state, jeopardy might have attached in 1979 and the Double Jeopardy Clause would bar Massie's retrial; but in California, jeopardy never attached, and Massie may be retried, convicted, and executed.

In *Benton v. Maryland*, 395 U.S. at 795-96, this Court held that the Double Jeopardy Clause is a protection so fundamental that it must apply equally everywhere, not only to federal but to state criminal convictions as well. It is far too late in the day to argue, as the Attorney General does here, that a holding which subjects the Double Jeopardy Clause to the whims of state legislatures is unimportant. The Petition presents issues of substantial importance.

C. MASSIE'S RETRIAL CANNOT BE EXCUSED BASED UPON THE FICTION THAT THE 1985 APPEAL WHICH LED TO REVERSAL OF MASSIE'S FIRST CONVICTION WAS "HIS" APPEAL

The Attorney General claims that even if the California Supreme Court erred in finding that jeopardy did not attach to Massie's 1979 conviction and death sentence, the error was not prejudicial. Massie had no constitutional right to represent himself in his 1985 appeal, the Attorney General insists. (Opp. at 17, 19-22.) Therefore, the attorney forced upon Massie in connection with that appeal, which Massie tried to dismiss *in pro per* in state and federal court, was in reality "his" attorney arguing "his" appeal. (Opp. at 15-17.) As a result, the attorney's conduct in obtaining reversal of Massie's conviction "waived" Massie's double jeopardy rights, despite Massie's repeated assertion of those rights. (Opp. at 15-16.) Therefore, California may retry Massie or any other capital defendant on murder charges as many times as it wishes, even if the defendant vigorously asserts his double jeopardy rights and attempts to dismiss the coerced appeal.

This Court has rejected the notion that double jeopardy rights can be "waived" without any showing that the defendant has made a knowing, intelligent, and voluntary choice, properly labelling such coercive "waivers" as unconstitutional forfeitures. *Green v. United States*, 355 U.S. 184, 191-94 (1957).

But even if the Attorney General were correct in arguing that double jeopardy rights can be "waived"

through state coercion rather than voluntary choice, making a perpetual treadmill of retrials constitutionally permissible, his argument is based upon the proposition that the right of a criminal defendant to control his defense, if necessary by self-representation, established in *Faretta v. California*, 422 U.S. 806, 819-21, 834 (1975), does not extend to the defendant's appeal. If it does, the appeal conducted by the attorney forced upon Massie in 1985 cannot be "his" appeal, and Massie's retrial cannot be justified, as the Attorney General argues, by the proposition that there is no double jeopardy bar to retrying a criminal defendant who appeals and obtains reversal of his conviction.

This Court has agreed to decide whether a criminal defendant has a constitutional right to represent himself on appeal in *Martinez v. Court of Appeal of California*, No. 98-7809. Assuming such a right exists, which Massie believes it plainly does, the 1985 appeal conducted against Massie's will by the state-appointed counsel cannot be imputed to Massie and cannot justify his retrial.[2]

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[2] This Court will also consider related issues of a criminal defendant's right to control his appeal in *Smith v. Robbins*, No. 98-1037, pet. for writ of certiorari granted, March 8, 1999. *Smith* involves the issue of whether an appointed appellate counsel provides constitutionally ineffective assistance when he declines to raise issues on appeal which his client wants argued, instead filing a brief limited to a discussion of the facts and inviting the court to independently review the record for error. However, this Court's decision in *Smith* will not resolve the issues raised in this petition, because *Smith* involves the question of what happens when counsel refuses to raise *any* issues on appeal, despite his client's insistence. In this case, Massie's 1985 appellate counsel raised issues against Massie's

However, merely deciding the *Martinez* case will not fully illuminate the important issue of what degree of control the Constitution requires that a defendant be given over his appeal. This Court made it clear in *Faretta v. California*, 422 U.S. at 834, that the constitutional right to defend – to make the central decisions involved in the defense – and the constitutional right to represent oneself are two separate concepts, with the absolute right to defend including within it the more limited right to represent oneself. *See Adams v. United States*, 317 U.S. 269, 279-80 (1942) ("To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose . . . simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience"); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also Godinez v. Moran*, 509 U.S. 389, 399 (1993). Should this Court decide that the constitution requires that a defendant be permitted to represent himself on appeal, but decline to decide this case as well, the states will be free to strip the right to represent oneself on appeal of all meaning by denying the criminal defendant the right to make the central decisions involved in the appeal, such as when to dismiss it. Even if the Court decides that a criminal defendant has no constitutional right to represent himself on appeal, unless the Court decides this case as well the states will be free to conclude that the lack of a right to represent oneself

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will which involved a goal for the representation which Massie had specifically repudiated – reversal and a second murder trial. This Court should grant this petition as well in order to resolve this related, but distinct issue of a criminal defendant's constitutional right to control his appeal by determining the goals of that appeal.

necessarily means that the defendant can be stripped of any control over the appeal at all. Only by deciding both *Martinez and* this case may the Court fully settle the issues involved in this important area.

As a matter of California law, Massie had no control whatsoever over the 1985 automatic appeal. (Pet. at 23.) Acting *in pro per*, he was denied the right, both in state and federal court, to control that appeal by dismissing it. (Pet. at 6-10.) To argue that the appeal was nevertheless "his" appeal, resulting in the loss of his double jeopardy rights and exposing him to a theoretically endless cycle of involuntary retrials, is contrary to this Court's decisions in *Adams v. United States*, *Faretta v. California* and *Jones v. Barnes*.

CONCLUSION

The California Supreme Court's decision is in direct conflict with numerous decisions of this Court and several Circuits and state courts of last resort. Particularly given this Court's orders granting certiorari in *Martinez v. Court of Appeal of California*, No. 98-7809 and *Smith v. Robbins*, No. 98-1037, this Court should grant the petition for writ of certiorari herein in order to fully explain the degree of control which the constitution requires that a criminal defendant be given over his appeal.

Respectfully submitted,

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